PP

v.

SHAHRAEL AMIR SUHAIMI

COURT OF APPEAL, PUTRAJAYA
ABDUL MALIK ISHAK JCA
AZAHAR MOHAMED JCA
HAMID SULTAN ABU BACKER JCA
[CRIMINAL APPEAL NO: A-05-13-01-2012]
30 APRIL 2014

CRIMINAL PROCEDURE: *Appeal - Appeal against acquittal and discharge - Accused charged for offence of murder of three persons - Penal Code s. 302 - Accused found at crime scene with items belonging to deceased and blood-stained murder weapon - Denial of committing crime - Accused acquitted and discharged without being called to enter defence - Whether trial judge took into account circumstantial evidence - Whether not running away from crime scene proved innocence - Whether circumstantial evidence solid enough to show accused's culpability - Whether prima facie case proven*

EVIDENCE: *Circumstantial evidence - Inference of facts - Accused found at crime scene with items belonging to deceased and murder weapon - Denial of committing crime - Whether not running away from crime scene proved innocence - Accused acquitted and discharged without being called to enter defence - Whether circumstantial evidence solid enough to show accused's culpability - Whether trial judge took into account circumstantial evidence - Whether prima facie case proven - Evidence Act 1950 s. 114*

In the High Court, the accused ('the respondent') was acquitted and discharged without being called to enter defence of the offence under s. 302 of the Penal Code for murdering three persons, namely the wife, daughter and maid of the complainant ('SP5'). SP5 had received a telephone call from his wife about a robbery in the house and upon reaching the house, SP5 saw the respondent sitting on a motorcycle by the side of the house. Upon confronting the respondent, he denied committing it. When he walked in the house, SP5 found all the three deceased persons brutally murdered. Some items belonging to the deceased and a murder weapon with blood stains were recovered from the respondent. The evidence was greatly in favour of the respondent as he did not run away from the crime scene even though he had

A ample opportunity to do so. Dissatisfied, the prosecution ('the appellant') appealed against the respondent's acquittal and discharge and submitted that the trial judge erred by failing to consider and take into account the circumstantial evidence proving the respondent's involvement in the commission of the crime that
B led to the death of the three deceased persons.

Held (allowing appeal; remitting case to High Court and directing respondent to enter defence)
Per Hamid Sultan Abu Backer JCA delivering the judgment
C **of the court:**

(1) The appellant had succeeded in proving a *prima facie* case of murder against the respondent (para 18).

(2) Incriminating evidence as well as items belonging to the
D deceased was recovered from the respondent and/or bag which he was said to be in possession of or at least had nexus to. This *per se* would attract criminal culpability pursuant to s. 114 of the Evidence Act 1950 ('the Act'). By the application of s. 114 of the Act, the court was obliged to look
E at the totality of the evidence more so when incriminating evidence as well as property of the deceased where nexus can be inferred to rule that a *prima facie* case had been established. (paras 13 & 14)

F **(3)** Section 114 of the Act actually assists the prosecution to whittle down the maximum evaluation test at the prosecution stage only. Similarly, ss. 37(d) or 37(da) of the Dangerous Drugs Act 1952 or even s. 34 of the Penal Code has the effect of whittling down the maximum evaluation test at the
G prosecution stage if by law it becomes operative. Trial judges must take note of the distinction when considering the maximum evaluation test at the end of the prosecution stage (para 14).

H **(4)** To find culpability based on circumstantial evidence, the evidence must be sufficiently strong to convict. The conduct of the respondent as well as stolen items of the deceased, the murder weapon, blood stains and the proximity of time of the phone call and the respondent's oral statement of denial that
I he had committed it would clearly warrant the defence to be called. (paras 16 &17)

Bahasa Malaysia *Translation Of Headnotes*

Di Mahkamah Tinggi, tertuduh ('responden') telah dilepaskan dan dibebaskan tanpa dipanggil untuk membela diri bagi kesalahan di bawah s. 302 Kanun Keseksaan kerana membunuh tiga orang, iaitu isteri, anak perempuan dan pembantu rumah pengadu ('SP5'). SP5 telah menerima panggilan telefon daripada isterinya mengenai rompakan di dalam rumah dan setibanya di rumah, SP5 melihat responden sedang duduk di atas motosikal di sebelah rumah tersebut. Apabila SP5 berdepan dengannya, responden menafikan melakukannya. Apabila dia memasuki rumah, SP5 menjumpai ketiga-tiga si mati telah dibunuh secara kejam. Beberapa barangan milik si mati dan senjata dengan kesan darah telah dirampas daripada responden. Keterangan amat berpihak kepada responden kerana dia tidak melarikan diri daripada tempat kejadian walaupun dia mempunyai peluang luas untuk berbuat sedemikian. Tidak berpuas hati, pihak pendakwaan ('perayu') merayu terhadap pelepasan dan pembebasan responden dan menghujahkan bahawa hakim bicara terkhilaf kerana gagal mempertimbangkan dan mengambil kira keterangan ikut keadaan yang membuktikan penglibatan responden dalam melakukan jenayah yang menyebabkan kematian ketiga-tiga orang si mati.

Diputuskan (membenarkan rayuan; mengembalikan kes kepada Mahkamah Tinggi dan memerintahkan responden untuk membela diri)
Oleh Hamid Sultan Abu Backer HMR menyampaikan penghakiman mahkamah:

(1) Perayu berjaya membuktikan kes *prima facie* terhadap responden.

(2) Keterangan yang menunjukkan kesalahan berserta barangan lain milik si mati telah didapati daripada responden dan/atau beg yang mana dia dikatakan memiliki atau paling tidak, mempunyai perkaitan. Ini sahaja akan mencetuskan kebersalahan jenayah di bawah s. 114 Akta Keterangan 1950 ('Akta'). Melalui pemakaian s. 114 Akta, mahkamah berkewajipan untuk melihat pada keseluruhan keterangan khasnya apabila keterangan yang menunjukkan kebersalahan berserta barangan milik si mati yang mana perkaitan boleh disimpulkan untuk memutuskan bahawa kes *prima facie* telah dibuktikan.

(3) Seksyen 114 Akta sebenarnya menggesa pihak pendakwaan untuk merangka ujian penilaian maksimum di peringkat pendakwaan sahaja. Begitu juga, ss. 37(d) atau 37(da) Akta Dadah Berbahaya 1952 mahupun s. 34 Kanun Keseksaan mempunyai kesan merangka ujian penilaian maksimum di peringkat pendakwaan jika di bawah undang-undang, ia menjadi operatif. Hakim-hakim bicara mestilah mengambil perhatian mengenai perbezaannya dalam mempertimbangkan ujian penilaian di peringkat akhir kes pendakwaan.

(4) Untuk membuktikan kebersalahan berdasarkan keterangan ikut keadaan, keterangan mestilah cukup kukuh untuk mensabitkan. Perlakuan responden berserta barangan milik si mati yang dicuri, senjata, kesan darah dan kedekatan antara masa panggilan telefon dan kenyataan lisan responden mengenai penafian bahawa dia melakukannya jelas mewajarkan agar pembelaan dipanggil.

Case(s) referred to:
Bakshish Singh v. The State of Punjab AIR 1971 SC 2016 ***(refd)***
Johar Mustapha v. PP [2008] 5 CLJ 590 CA ***(refd)***
Juraimi Husin v. PP [1998] 2 CLJ 383 CA ***(refd)***
Kartar Singh & Anor v. Rex [1952] 1 LNS 43 HC ***(refd)***
Mohd Abbas Danus Baksan v. PP [2006] 3 CLJ 880 CA ***(refd)***
PP v. Hanif Basree Abdul Rahman [2004] 3 CLJ 700 HC ***(refd)***
PP v. Mohd Bandar Shah Nordin & Anor [2008] 4 CLJ 859 CA ***(refd)***
PP v. Richard Chia Kok Hiong [2007] 3 MLJ 129 ***(refd)***
PP v. Sarjit Kaur Najar Singh [1998] 5 CLJ 609 HC ***(refd)***
PP v. Syed Muhamad Faysal Syed Ibrahim [2004] 1 LNS 159 HC ***(refd)***
Razak Abu v. PP [2008] 8 CLJ 252 HC ***(refd)***
Sunny Ang v. PP [1965] 1 LNS 171 FC ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 37(d), (da)
Evidence Act 1950, s. 114
Penal Code, s. 34

For the appellant - Andi Razalijaya A Dadi; DPP
For the respondent - Ameenuddin Ibrahim; M/s Nurul & Charan

[Appeal from High Court, Ipoh; Criminal Trial No: 45B-11-2009]

Reported by Najib Tamby

JUDGMENT

Hamid Sultan Abu Backer JCA:

[1] The appellant's (Public Prosecutor) appeal is against the decision of the learned High Court Judge who acquitted and discharged the respondent ("accused") in respect of the murder of three persons at the end of the prosecution case itself. We heard the appeal on 24 June 2013 and allowed the appeal and remitted the case back to the High Court and directed defence to be called. My learned brothers Abdul Malik bin Ishak JCA and Azahar bin Mohamed JCA have read the draft judgment and approved the same. This is our judgment.

[2] The learned trial judge had written a 28 pages judgment setting out the facts and grounds in great detail. In consequence, for the purpose of this appeal, we do not think much judicial time ought to be spent at this stage save to deal with the core issues.

[3] The accused was charged with murdering the wife, daughter and maid of the complainant ("SP5"). The three charges read as follows:

(1) Bahawa kamu pada 20 Mei 2009 jam lebih kurang 2.30 petang hingga 3.00 petang, di sebuah rumah beralamat No. 67, Laluan Pinji Seni 4, Taman Pinji Seni, Ipoh dalam Daerah Kinta, dalam Negeri Perak Darul Ridzuan telah membunuh DANI MIASIH, Pasport No: T094831 dan dengan itu kamu telah melakukan kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.

(2) Bahawa kamu pada 20 Mei 2009 jam lebih kurang 2.30 petang hingga 3.00 petang, di sebuah rumah beralamat No. 67, Laluan Pinji Seni 4, Taman Pinji Seni, Ipoh dalam Daerah Kinta, dalam Negeri Perak Darul Ridzuan telah membunuh WAN YAH BINTI MAT ZI, No. K/P: 670116-08-5310 dan dengan itu kamu telah melakukan kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.

(3) Bahawa kamu pada 20 Mei 2009 jam lebih kurang 2.30 petang hingga 3.00 petang, di sebuah rumah beralamat No. 67, Laluan Pinji Seni 4, Taman Pinji Seni, Ipoh dalam Daerah Kinta, dalam Negeri Perak Darul Ridzuan telah membunuh MUHAMMAD ERMINNDANISH BIN JAFRI, No. Mykid: 040131-08-0095 dan dengan itu kamu telah melakukan kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.

A **Brief Facts**

[4] SP5 received a telephone call from his wife about a robbery in the house. SP5 reached the house within 15 minutes. Before entering the house he saw the accused sitting on a motorcycle by
B the side of house and when he confronted him the reply was 'bukan saya yang buat, Pakcik'. When he went into the house he found all the three persons mentioned in the charges brutally murdered. Subsequently, the accused was beaten by SP5 and his friend SP6 who was also there. Some items of the deceased were
C recovered from the accused as well as in the bag he was said to be carrying. The murder weapon with blood stains was also found. And it was SP6's evidence that he saw the accused placing the murder weapon in the bag. The only evidence which is not in dispute and greatly in favour of the accused is that he did not run
D away from the crime scene when he had ample opportunity to do so.

[5] The appellant's complaint in the petition of appeal can be summarised as follows:

E (1) The learned trial judge erred in fact and law by acquitting and discharging the accused from 3 charges under section 302 of the Penal Code at the end of the prosecution stage without calling for defence.

F (2) The learned trial judge erred in fact and law when deciding that SP5 had given contradicting evidence on the 2 handphones P12A and P13A belonging to the victims without giving due consideration that SP5 had corrected his testimony after refreshing his memory with his own statement and SP5 admitted that he had forgotten as the
G incident occurred a long time ago. Furthermore, the discovery of P12A and P13A were consistent with the testimony of SP16.

(3) P12A had blood stains containing DNA profiles of the 2nd and 3rd victims.

H (4) The learned trial judge erred in deciding that the testimonies of SP5 contradict the testimony of SP6 regarding the state the accused was in when he was outside the house; whether he was merely sitting on his motorcycle or walking while putting the knife into bag P15A. At the time, SP5 was in a
I chaotic state where he entered and exited the house several times. When he was inside the house, there was no way he

could have known what the accused was doing outside. What more when there was no one else outside the house except for the accused.

(5) The learned trial judge erred by finding doubt as to why SP5 did not find P12A and P13A when seizing the money of RM600.00 from the accused's pants when SP16 found the same.

(6) SP5 saw the victim's laptop inside the bag P15A when he peeked inside and it was reasonable for him to not see the knife P22B in the bag. The knife had the DNA profiles of all three victims, and it was found inside the accused's bag.

(7) The learned trial judge erred when deciding that the court could not make an inference that the jacket P77A tainted with blood and DNA of the victims, belonged to the accused, even when the jacket was recovered near the accused's motorcycle.

(8) The learned trial judge erred in fact and law by deciding that the 4 strands of hair found in the accused's helmet did not have the accused's DNA, when the chemist clearly stated that there was no DNA on the hair and there was no sample for comparison.

(9) The learned trial judge erred when deciding that the accused's words 'bukan saya yang buat, Pakcik' to SP5 shows his innocence. The words show that the accused knew the state of affairs inside the house.

(10) The learned trial judge erred in deciding that there were other persons inside the house with the presence of several shoe prints.

(11) Although the serial number of the laptop P14A did not match the purchase receipt P19, when SP19 had activated the laptop in court and confirmed the photos inside the laptop were of the victims and family members amongst other information.

(12) SP11 and SP12 identified the accused as the person who came to their shop before the incident, to sharpen the back of the knife P22B for RM5.00. SP14 admitted that he had sharpened the back of the knife on instructions from SP11 and SP12.

A (13) The learned trial judge erred by failing to appreciate the principle in *Sunny Ang v. PP* [1966] 2 MLJ 195 and failed to consider and take into account circumstantial evidence proving accused's involvement in the commission of the crime that led to the death of all three victims.

B **[6]** In the instant case, before SP5 entered the house, the accused had already stated that he did not do it. Only subsequently SP5 came to know that all three had been brutally murdered. The circumstantial evidence and the contemporaneity of the events and the conduct of the accused will show at the first C instance that he had knowledge of the state of affairs in the house.

Jurisprudence Relating To Circumstantial Evidence And Prima Facie Case

D

[7] Circumstantial evidence may be defined as any fact from the existence of which the judge may infer the existence of a fact in issue. It is not the evidence direct to the point in issue, but evidence of various facts other than facts in issue which are so E connected with the facts in issue that taken together they form a chain of circumstances leading to an inference or presumption of the principal fact.

[8] The following appears to be the general principles observed by the courts when dealing with a case merely on circumstantial F evidence: (i) every fact or circumstance on which the prosecution relies must be clearly proved beyond the shadow of any doubt; (ii) the incriminating circumstances must lie incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than the guilt of the accused; (iii) the G circumstances from which the conclusion of guilt is to be drawn should be fully established, ie, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability, the H act must have been done by the accused; and (iv) the circumstances should be of a conclusive nature and tendency. (See *Juraimi Husin v. Public Prosecutor* [1998] 2 CLJ 383; [1998] 1 MLJ 537; *PP v. Hanif Basree Abdul Rahman* [2004] 3 CLJ 700; *PP v. Sarjit Kaur Najar Singh* [1998] 5 CLJ 609; [1998] 1 MLJ I 184).

[9] In *Kartar Singh & Anor v. Rex* [1952] 1 LNS 43; [1952] 1 MLJ 856 Murray-Aynsley CJ observed: A

> Where there is direct evidence, however, slight, the jury are entitled to accept it and the case should be left to them to decide. **In the case of circumstantial evidence the position is different**. Here the evidence must be such that, if it is believed, there is no reasonable alternative to the guilt of the accused. If it is anything less than this it is no case at all. (emphasis added). B

[10] In the case of *Sunny Ang v. Public Prosecutor* [1965] 1 LNS 171; [1966] 2 MLJ 195 the accused was charged with the murder C of his lover, by allowing her to dive in unsafe waters. The prosecution led evidence to show that the accused was a bankrupt and his lover had taken life insurance policies, in which the accused was the beneficiary. The accused made a claim with the insurance company within 24 hours after her disappearance. D Basing on the circumstantial evidence the court convicted and sentenced the accused to death. The trial judge in his summing up stated:

> The second question to which I must draw your attention is that E the question in this case, depending as it does on circumstantial evidence, is whether the cumulative effect of all the evidence leads you to the irresistible conclusion that it was the accused who committed this crime, or is there some reasonably possible explanation. Such, for example was it an accident? Now, as I told you earlier, one of the points about circumstantial evidence is its F cumulative effect. Any one of these points taken alone might, you may think, be capable of explanation. The question for you is: where does the totality of them, the total effect of them all, lead you to? Adding them together, considering them not merely each one in itself, but altogether, does it or does it not lead you to the G irresistible inference and conclusion that the accused committed this crime? Or is there some other reasonably possible explanation of those facts? The prosecution case is that the effect of all the evidence drives you irresistibly and inexorably to the one conclusion and one conclusion only that it was the accused who intentionally caused the death of this young girl. H

[11] In *Bakshish Singh v. The State of Punjab* AIR 1971 SC 2016 the Indian Supreme Court reaffirmed the principle when dealing with cases resting merely on circumstantial evidence and stated:

> In a case resting on circumstantial evidence, the circumstances put I forward must be satisfactorily proved and those circumstances should be consistent only with the hypothesis of the guilt of the

A accused. Again those circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.

[12] In *Mohd Abbas Danus Baksan v. PP* [2006] 3 CLJ 880 Gopal Sri Ram JCA (as he then was) held:

C The learned JC was very much alive to the fact that the case against the appellant rested on circumstantial evidence and he used the timehonoured formula, the "irresistible conclusion", when discussing the legal test to be applied to such evidence. Considering the circumstances and especially the appellant's D conduct, so far as the appreciation of the prosecution's evidence was concerned, there was no merit in the appellant's argument that inferences favourable to the appellant were not drawn from evidence that admitted of such inferences. Against the cold facts of this case, the appellant's plea of guilt to the charge of rape did E nothing to weaken the prosecution's case. Accordingly, there was no merit in the submission that the appellant's plea of guilt to the charge of rape lent credence to his denial of Nurul's killing. It was clear from the judgment under appeal that the learned JC went through all the points made in the unsworn statement and found them to be wanting. Some of the matters raised in the F unsworn statement were never put to the prosecution's witnesses and that, of course, would have the effect of diminishing the probative value that was to be attached to the unsworn statement. Taking into account all the relevant facts and circumstances of this case, there was no error in the way in which the learned JC G appreciated the case for the defence. The evidence pointed to the appellant having committed this heinous crime; the case against the appellant had been proved beyond a reasonable doubt.

(See *PP v. Syed Muhamad Faysal Syed Ibrahim* [2004] 1 LNS 159; [2004] 6 MLJ 303; *Public Prosecutor v. Richard Chia Kok Hiong* H [2007] 3 MLJ 129; *Razak Abu v. PP* [2008] 8 CLJ 252; [2008] 4 MLJ 248; *PP v. Mohd Bandar Shah Nordin & Anor* [2008] 4 CLJ 859; [2008] 4 AMR 806; *Johar Mustapha v. PP* [2008] 5 CLJ 590; [2008] 5 AMR 303).

I

[13] It is also not in dispute that incriminating evidence as well as items belonging to the deceased were recovered from the accused and/or bag which he was said to be in possession of or at least had nexus to. This *per se* will attract criminal culpability pursuant to s. 114 of the Evidence Act 1950 which states:

> The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.

[14] Where circumstantial evidence is in issue, as a general rule by the application of the maximum evaluation test at the prosecution stage, the prosecution ordinarily may not be able to convince the court that the *prima facie* case has been established. However, by the application of s. 114 of the Evidence Act 1950 the court in the instant case is obliged to look at the totality of the evidence more so when incriminating evidence as well as property of the deceased were found in the possession of the accused or were found in such circumstances where nexus can be inferred to rule that a *prima facie* case has been established. Section 114 presumption will require in law for the accused to speak out on his innocence at the defence stage to earn an acquittal. Section 114 actually assists the prosecution to whittle down the maximum evaluation test at the prosecution stage only. Similarly s. 37(d) or s. 37(da) of the Dangerous Drugs Act 1952 or even s. 34 of the Penal Code has the effect of whittling down the maximum evaluation test at the prosecution stage if by law it becomes operative. Trial judges must take note of the distinction when considering the maximum evaluation test at the end of the prosecution stage.

[15] Despite strong circumstantial evidence against the accused, the learned trial judge in many parts of her judgment had attempted to reason out that it was not sufficient to establish a *prima facie* case without considering the statutory obligation set out in s. 114 in favour of the prosecution. One example is found at p. 23 which reads as follows:

> The bloodstain found on the knife bore the mixed DNA profiles of the three victims (see P89, SP13's chemist report). The knife was recovered by SP18 from the bag P15A together with other items like P14A, P39A, P74, P75B, P115A, P116A, P117A, P118A, P119A, P120A, P121A and P122A (see P111) but only a small bloodstain between the handle and the blade was found on the knife.

A **[16]** It is well settled to find culpability based on circumstantial evidence, the evidence must be sufficiently strong to convict. When it relates to a charge of murder courts have convicted notwithstanding there was (i) no eye witness even after the crime was committed; (ii) no body of the deceased was found; (iii) no
B murder weapon was found; and (iv) no nexus to the murder was established save as to irresistible inference based on documentary evidence *per se*. (See *Sunny Ang v. Public Prosecutor* [1965] 1 LNS 171; [1966] 2 MLJ 195).

C **[17]** In the instant case the conduct of the accused as well as stolen items of the deceased, the murder weapon, blood stains, and the proximity of time of the phone call as well as the conduct of the accused and his oral statement 'bukan saya yang buat', etc; will clearly warrant the defence to be called. In addition, it is not
D for the learned trial judge to test the truthfulness of the evidence of SP5 and/or SP6 at this stage when s. 114 of the Evidence Act 1950 becomes operational without hearing the evidence of the accused when nexus has been established.

E **[18]** We have perused the evidence in detail and we are satisfied that the prosecution had succeeded in proving a *prima facie* case of murder against the accused.

[19] We are of the considered view that this is a case where appellate intervention is necessary.

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[20] We remit the case to the High Court and direct the accused to enter his defence.

[21] We hereby order so.

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